No. 15678

In the

United States Court of Appeals

For the Ninth Circuit

1957 Term

KINGMAN WATER COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court for the District of Arizona

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STATEMENT OF JURISDICTION

A. Jurisdiction of the District Court.

The jurisdiction of the Court below was predicated upon 28 U.S.C. Sec. 1345, in that the United States of America was a party plaintiff. The jurisdictional facts, as set out above, were pleaded in plaintiff's Complaint (T.R. 3) and admitted in defendant's Answer thereto (T.R. 6).

B. Jurisdiction of the Court of Appeals.

The jurisdiction of the Court of Appeals rests upon 28 U.S.C. Sec. 1291, as an appeal from a final decision of a

District Court, and appeal was timely taken as follows, to wit: on March 14, 1957, the United States District Court for the District of Arizona, Honorable James A. Walsh, United States District Judge, presiding, made and filed its Findings of Fact and Conclusions of Law (T.R. 13-16), and Judgment was entered in the Civil Docket in favor of plaintiff on March 19, 1957 (T.R. 16). On March 25, 1957, defendant served its Motion to Amend and Supplement Findings of Fact and Conclusions of Law (T.R. 24-26), Motion for New Trial (T.R. 20-21), and Motion to Dismiss (T.R. 17). On March 28, 1957, defendant served its Supplement to Motion for New Trial (T.R. 21-23) and Supplement to Motion to Amend Findings of Fact and Conclusions of Law (T.R. 28-30). Thereafter, on May 14, 1957, the Court below entered its order amending the Findings of Fact and Conclusions of Law made and filed on March 14, 1957, its further order denying defendant's Motion to Dismiss, Motion for New Trial and Motion to Amend and Supplement Findings of Fact and Conclusions of Law and its further order amending the judgment therefore entered (T.R. 32-33; 16). On July 12, 1957,[1] defendant filed its Notice of Appeal (T.R. 33), and the record was filed and the Appeal docketed on August 16 and 22, respectively (T.R. 99).

STATEMENT OF THE CASE

A. Background of the Action.

In 1943, Plaintiff-Appellee, the United States of America, acting by the Federal Public Housing Administration, undertook plans to establish a wartime housing project at the City of Kingman, County of Mohave, State of Arizona.

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1. Time for filing Notice of Appeal herein is 60 days as to all parties, rather than the usual 30 days, because the United States is a party hereto; Rule 73, Federal Rules of Civil Procedure; 28 U.S.C. Sec. 2107.

This project, known as "Vista Solana Homes", was subsequently constructed in 1944, and consisted of 120 dwelling units (T.R. 3-6; 6-8; 36-38).

Defendant-Appellant, Kingman Water Company, is, and at all times material hereto was (as to its general activities)[2] a corporation doing business as a public utility at the City of Kingman, County of Mohave, State of Arizona, engaged in the supplying of water for public use (T.R. 3; 6). As a public utility doing business in the State of Arizona, Defendant at all times had on file with the Arizona Corporation Commission its schedule of water rates, denominated "Tariff No. 1" (Plaintiff's Exhibit 1 in Evidence; T.R. 40-41). Said schedule established that for commercial water rates the Kingman Water Company was entitled to receive "$2.50 minimum rate of 3000 gallons", together with decreasing rates for increasing quantities of water, all as set forth in the schedule. The schedule further provided: "All connections metered." This schedule bore date of August 12, 1919, and was in force and effect at all times material hereto (T.R. 40-41).[3]

In 1943, prior to the actual construction of the project in 1944, and while the project was still in the planning stages, the Federal Public Housing Administration entered into negotiations with the Kingman Water Company for the supplying of water to the project (T.R. 36-37). The evidence and testimony on the trial of the cause indicate that when the project was in the planning stages it was contemplated that each of the 120 units would be served by an individual water meter (T.R. 72), and the negotiations between the

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2. The distinction between the general activities of a public utility and certain of its other activities is hereinafter more fully developed; see Argument, I (Issue No. 1), *infra,* page 14, et seq.

3. The full text of "Tariff No. 1" is set out in the appendix at the close of this Brief, as "Exhibit A" to Plaintiff's Complaint.

Federal Public Housing Administration and Defendant were conducted upon that basis.

However, when actual construction of the project was commenced, it was found that such individual meters were not available due to shortages of materials brought about by World War II (T.R. 64-65; 83). Accordingly, the contemplated construction plans were adjusted to the factual situation, and service lines to the 120 units were established through four "master meters" and without employment of the contemplated individual meters (T.R. 51-53; 58-59).

On April 20, 1944, prior to the time that any water had been delivered by defendant, a draft of a proposed contract between the United States of America and Defendant was sent to Defendant by the Federal Public Housing Administration. This draft of contract (Plaintiff's Exhibit 2 in Evidence),[4] proposed that Defendant provide water through "master meters", the readings of such master meters to be considered as one for the purpose of rates and billings. The proposed contract further specifically provided that upon delivery of the water to plaintiff, said water would cease to be defendant's property and title thereto would pass to plaintiff, and that plaintiff would own and operate a "secondary water distribution system" and could "sell or otherwise distribute water to the tenants as an incident of tenancy" (Plaintiff's Exhibit No. 2 in Evidence, T.R. 42-43).[5] By letter dated May 8, 1944, Defendant, by its then counsel, Carl G. Krook, acknowledged receipt of the proposed contract and rejected the same, advising the Federal

4. Plaintiff's Exhibit 2 was not printed in the Transcript of Record. Its full text, however, is set out in the appendix at the close of this brief.

5. It will be noted that Plaintiff's Exhibit 2 was originally denied admission into evidence. T.R. 42-44. At a later point, however, the objection was withdrawn and the exhibit received into evidence. T.R. 76.

Public Housing Administration "that the proposed agreement is not satisfactory in view of the many changes in the field". The letter concluded by requesting the Federal Public Housing Administration to send a representative to Kingman, Arizona, for discussion and negotiation (T.R. 53-54). It is undisputed that the Kingman Water Company did not at any time execute this proposed contract or otherwise agree to provide water service during the period in question upon the terms therein provided (T.R. 37).

Thereafter, officials of the Federal Public Housing Administration conferred in Kingman, Arizona, with I. M. George, president of defendant, regarding the situation (T.R. 81-82). It was acknowledged, upon discussion, that if individual meters had been regularly installed, defendant would have received a $2.50 minimum charge for each such individual meter (T.R. 84); that is to say, the same charge as was then being made to any other user in the community and the charge authorized by defendant's rate on file with the Arizona Corporation Commission (T.R. 86). It was also acknowledged that individual meters were then unavailable —defendant did not have the requisite number of meters and neither party could get them (T.R. 83; 84). Thereupon, the premises considered, it was agreed between the Federal Public Housing Administration officials and defendant's president that defendant would furnish water to the housing project through the master meters, but that the rates were to apply to the individual dwelling units; that is, it was agreed between the parties that each unit was to be furnished on the basis of the existing tariff, all "as if" the individual meters had been installed (T.R. 83-84).

The agreement was entirely oral and was never reduced to writing. However, pursuant to the foregoing oral agreement, defendant commenced to supply water to the housing

project in May, 1944, and continued to supply water thereto for many years (T.R. 84).

Subsequent to May of 1944, and from time to time, defendant rendered its statements or billings for the water delivered by it to the housing project. In each case the billing was rendered by computing charges in the manner agreed upon in the oral agreement of 1944, to wit: as though there were a separate meter at each of the 120 units in the project (T.R. 3-6; 6-8; 36-39). In each case these billings were promptly paid by plaintiff, with the sole exception of the amounts billed for June and July, 1951 (T.R. 36-39). No objection was raised to any of such billings between commencement of service and June 12, 1951 (T.R. 54-55).

In 1952, by formal complaint brought before the Arizona Corporation Commission, plaintiff sought to recover alleged overcharges (T.R. 55). This relief was denied by decision of the Arizona Corporation Commission, dated December 20, 1952 (Defendant's Exhibit A in evidence), upon the ground that the matter before the Commission involved a contest "between private litigants" and therefore the Commission lacked jurisdiction to determine the matter (T.R. 56-57).

B. The Present Litigation.

In 1956 plaintiff commenced the present action, alleging a contract with defendant "at the rates specified by the published tariff", and alleging an "overcharge" of $15,824.33 (T.R. 3-6). This figure was arrived at upon the premise that the billings rendered to and paid by plaintiff were erroneous in that "defendant made its charges as though there were a separate meter at each of the 120 housing units in the project" (T.R. 3-6; 37-38).

Defendant answered plaintiff's Complaint by admitting that a contract had been entered into and by admitting that

its charges were made as though there were separate meters at each of the units, but denying any overcharge whatever (T.R. 6-7). The Answer further affirmatively alleged the following matters:

1) The oral agreement between the parties, to the effect that due to the unavailability of separate meters charges would be made "as if" there were separate meters, notwithstanding their physical absence (T.R. 7); and

2) That plaintiff accepted the billings and paid the same (T.R. 8).

It is to be noted that plaintiff's Complaint on file herein affirmatively establishes by its own allegations that plaintiff paid the money sought to be recovered in this action voluntarily, under claim of right in the defendant, and with full knowledge of all of the facts (T.R. 3-6).[6] The Complaint was therefore attacked by defendant's Motion to Dismiss for failure to state a claim upon which relief could be granted, upon the ground that the Complaint stated facts precluding recovery under substantive rules of law which provide that money voluntarily paid under claim of right with full knowledge of the facts cannot be recovered back (T.R. 17-20).

Trial of the action brought out the facts as recited hereinabove under the heading "Background of the Action", together with undisputed testimony establishing that so far as the defendant was concerned, it was its uniform policy to make billings for the number of units served in cases where a multiple unit dwelling was served through a master meter (T.R. 66).

The Court made Findings of Fact and Conclusions of Law (T.R. 13-16; 32) and entered judgment for the defend-

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6. For the convenience of the Court, the complete text of the Complaint has been set forth as an appendix at the close of this brief.

ant (T.R. 16; 32). Defendant's several after-judgment motions were denied (T.R. 33) and this appeal followed (T.R. 33).

For the sake of consistence, the parties will be referred to herein as designated below, i.e. as "Plaintiff" and "Defendant".

THE ISSUES INVOLVED

This Appeal presents three issues, the resolution of any one of which in favor of defendant would appear to call for reversal under instruction to enter judgment for defendant. Inasmuch as the evidence is without conflict, the only question is of the legal effect of the facts brought out by the evidence; therefore the issues, in final analysis, present only questions of law.

ISSUE NO. 1

Was the defendant, in the performance of these services to plaintiff, acting as a public utility and therefore bound by its tariff rates on file with the Arizona Corporation Commission; or was it acting in a private capacity and thus free from all such regulation?

ISSUE NO. 2

If defendant was, in fact, acting as a public utility, was there, as a matter of fact or a matter of law, any variance between the filed rate and the rate actually charged; or was the contract between the parties really a device employed by them to conform the charged rates to the filed rates, with the result that there was no variance whatever?

ISSUE NO. 3

Under the circumstances of this case, can the plaintiff, having voluntarily paid certain sums of money to defendant, under claim of right and with full knowledge of all the facts, now recover back such payment, contrary to substantive rules of Arizona law?

SPECIFICATIONS OF ERROR

I. Specification of Error No. 1 (Issue No. 1).

The District Court erred in making the following Findings of Fact and Conclusions of Law, respecting the capacity in which defendant performed the contract between itself and plaintiff:

a) Finding of Fact No. 3 (T.R. 13):
"3. That the defendant is a corporation doing business *as a public utility* at Kingman, Arizona;" (Emphasis supplied);

b) Finding of Fact No. 7, as amended (T.R. 32):
"7. That from May 20, 1944, to July, 1951, the defendant, *in its capacity as a public utility,* delivered water to the said Vista Solona Housing project through four meters * * *;" (Emphasis supplied);

The foregoing Findings of Fact are erroneous in that the undisputed evidence in this cause established that in delivering water through the master meters and not through individual meters, in performance of its contract with the plaintiff, defendant, as a matter of law, was doing what it was not under a duty to do except for such contract, which circumstance, under the laws of the State of Arizona, made such service a private activity, as to which private activity defendant was not acting as a public utility.

c) Conclusion of Law No. 3 (T.R. 15):
"3. Any agreement between plaintiff and defendant for water service at a rate different from that filed by the defendant with the Arizona Corporation Commission would be void;"

The foregoing Conclusion of Law is erroneous in that defendant, in the performance of its contract with plaintiff, was not acting as a public utility but in a private capacity, and therefore all regulations bearing upon its activities as

a public utility were inapplicable to the performance of this contract in its private capacity.

II. Specification of Error No. II (Issue No. 2).

The District Court erred in making the following Findings of Fact and Conclusions of Law respecting variance between the filed rate and the rate actually paid:

a) Finding of Fact No. 8 (T.R. 14):

"8. That as a result of this billing practice[7] *defendant overcharged the plaintiff* a total of $15,824.33 * * *;" (Emphasis supplied);

The foregoing Finding of Fact is erroneous in that the undisputed evidence indicates that the usual and contemplated billing practice, (i.e. by charging per individual meters) was not and could not be utilized solely because such individual meters were not available, and that service to the housing units was therefore established and billings agreed to be made "as if" individual meters had been utilized, all in order to conform the charges paid by plaintiff to the charges then being paid by any of defendant's customers. This conformance was accomplished through the contract entered into between the parties, as a result of which plaintiff paid no more than any other user, from which it follows that there was no overcharge whatever.

b) Conclusion of Law No. 3 (T.R. 15):

"3. Any agreement between plaintiff and defendant for water service at a rate *different from* that filed by the defendant with the Arizona Corpora-

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7. The "billing practice" referred to is set out in Finding of Fact No. 7, as follows:

"7. * * *; and the quantities of water so delivered were reported and billed for each monthly period solely on the basis of amounts appearing on said meters; but defendant made its charges as though there were a separate meter at each of the 120 units;" (T.R. 14; 32)

tion Commission would be void;" (Emphasis supplied);

The foregoing Conclusion of Law is erroneous because there is implicit in it the finding that the agreed rate was, in fact, "different from" the filed rate, which implicit finding is contrary to the undisputed evidence, which said evidence demonstrated that said contract conformed the rate to be charged to the filed rate and did not differ therefrom at all.

c) Conclusion of Law No. 4 (T.R. 15):
"4. Any ambiguity in the filed rate, Plaintiff's Exhibit No. 1, must be resolved against defendant since such rate was prepared by the defendant and submitted by defendant to the Corporation Commission for approval; so construed, the rate does not permit the charge of a monthly $2.50 minimum per residence unit";

The foregoing Conclusion of Law is erroneous on two separate grounds: first, in applying the rule of construction deferred to therein, in that such application fails to take the reason for the rule, as well as cogent surrounding circumstances, into consideration, to wit: that individual meters had been contemplated; that the sole reason that individual meters were not used was due to wartime shortages; that except for such shortages individual meters would have been used; that the "presence" of individual meters for billing purposes was supplied by agreement in absence of their physical existence; that plaintiff had full knowledge of each of these facts; and that under these circumstances the filed rate not only permitted but required a minimum rate of $2.50 per residence unit. Second, said Conclusion of Law is contrary to law, in that law requires that minimum charges be made on a "per consumer" and not a "per meter" basis.

d) Conclusion of Law No. 6 (T.R. 15)

"6. Plaintiff was *overcharged* in the sum of $15,824.33 * * *;" (Emphasis supplied).

The foregoing Conclusion of Law is erroneous upon all of the grounds and all of the reasons set forth in subdivisions a), b) and c) of this section, inasmuch as the foregoing Conclusion of Law follows as a conclusion of the errors committed in the Findings of Fact and Conclusions of Law set forth in said subdivisions a), b) and c).

III. Specification of Error No. III (Issue No. 3).

The District Court erred in denying and failing to grant defendant's Motion to Dismiss (T.R. 17), upon the ground and for the reason that plaintiff's Complaint failed to state a claim against defendant upon which relief could be granted, in that said Complaint affirmatively established that plaintiff had voluntarily paid the sum sought to be recovered under claim of right and with full knowledge of the facts.

IV. Specification of Error No. IV (General Issue).

The District Court erred in entering Judgment for plaintiff upon each of the grounds and for each of the reasons hereinabove specified under Specifications of Error I, II and III as the same pertain to Issues 1, 2 and 3.

SUMMARY OF ARGUMENT

I. (Issue No. 1).

It is conceded that defendant, as to its general activities, was a public utility. However, under Arizona law, a public utility may also have private activities. Under Arizona law a private activity arises in any case where a public utility

agrees, under contract, to do what it would not be under a duty to do except for such a contract, and such a situation is governed by rules applicable to private contracts in general and not by regulatory statutes. In this case, plaintiff, by tendering the 1944 contract to defendant, requested service through master meters. The law is well established that a public utility may lawfully refuse to serve a multiple unit dwelling through master meters, and it is undisputed that defendant did refuse to serve. It is therefore clear that defendant was under no duty to render the service which it performed and its performance therefore was a private activity, pursuant to its contract with plaintiff, and as such was an activity not at all governed by any of the regulatory statutes of the State of Arizona, or by its tariff rate on file with the Arizona Corporation Commission.

II. (Issue No. 2).

Even assuming that the activities of defendant in this case were those of a public utility, as such, which defendant denies, the undisputed evidence establishes that the tariff, promulgated in the year 1919, contemplated that each dwelling unit have an individual meter, and that individual meters had been contemplated for the plaintiff's housing project. Defendant's tariff on file with the Corporation Commission both authorized and required it to receive a $2.50 minimum charge for each such connection. However, under the particular conditions of World War II, which created severe shortages of materials, individual meters were not available from any source, and it was necessary to construct the project without such individual meters, and by using four "master meters" in lieu thereof. Therefore, in view of the fact that apart from the particular wartime circumstances, individual meters would have been used and

defendant would have been entitled to the minimum charges resulting therefrom, it was agreed that billings for water consumed would be made "as if" individual meters were actually in place; that is to say, the parties hereto employed the contract between themselves as a "fiction" to supply by agreement what was absent in fact, and the result of such fiction was merely to conform the charges made to plaintiff to the charges currently being paid by all other consumers in the community. The end result of this arrangement was therefore one of strict conformance to the filed rates, and in no wise constituted a variance therefrom; moreover, even apart from the factual background of this case, the District Court's Conclusion of Law that the filed rate did not permit a monthly minimum charge "per unit" is contrary to law, in that, in law, a minimum charge is not against the meter, but against the consumer.

III. (Issue No. 3).

It is the well-established law of the State of Arizona that where a party voluntarily makes payment of money to another, under claim of right to said payment, and where the party making the payment has full knowledge of all of the facts, that said payments may not be recovered. Plaintiff's Complaint affirmatively establishes that the payments herein were made voluntarily and under claim of right and with full knowledge of the facts; therefore, plaintiff is precluded by Arizona law from recovering any such payments. The rule applies fully to public utilities and to the United States as a paying party.

ARGUMENT

I. (Issue No. 1).

It was pleaded in plaintiff's Complaint that defendant was an Arizona public utility (T.R. 3). This fact was

admitted in defendant's Answer (T.R. 6). This allegation was pleaded and employed by plaintiff in support of its theory that if defendant was a public utility, then, *ipso facto,* it was bound by regulatory statutes of the State of Arizona bearing upon public utilities. The statutes referred to hereinabove are found in Arizona Revised Statutes, and provide as follows:

"*Sec. 40-367, Change of Rates; Notice; Filing; Exception.*

A. No change shall be made by any public service corporation in any rate, fare, toll, rental, charge or classification, or in any rule, regulation or contract relating to or affecting any rate, toll, fare, rental, charge, classification or service, or in any privilege or facility, except after thirty days' notice to the Commission and to the public as provided in this chapter.

B. Notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change to be made in the schedules then in force, and the time when the change will come into effect.

C. The Commission, for good cause shown, may allow changes without requiring the thirty days' notice provided for in this section, by an order specifying the changes so to be made and the time when they shall take effect, and the manner in which they shall be filed and published.

D. When any change is proposed, attention shall be directed to the charge on the schedule filed with the Commission by some mark, designated by the Commission, immediately preceding or following the item."

"*Sec. 40-374, Prohibition of Rebates and Agreements.*

Except as otherwise provided in this chapter, no public service corporation shall charge, demand,

> collect or receive a greater, less or different compensation for transportation of persons or property, or for any product or commodity, or for any service rendered in connection therewith, than the rates, fares, tolls, rentals and charges applicable to such transportation or product, commodity or service specified in its schedule on file and in effect at the time, nor shall any public service corporation refund or remit, directly or indirectly, in any manner or by any device, any part of the rates, fares, tolls, rentals, and charges so specified, nor extend to any person any form of contract, agreement or any rule or regulation, or any facility or privilege, except such as are regularly and uniformly extended to all persons and except under order of the Commission."

As the whole transcript of record discloses, it was plaintiff's theory throughout the progress of this action that inasmuch as defendant was a public utility it was bound by the above statutes designed to regulate public utilities, and that therefore defendant's contract with plaintiff, which contract plaintiff contends is "different from" defendant's filed rate, was void under and by virtue of the foregoing statutes. The manner in which this "difference" was manifested will be pointed out in the next section of this argument. However, for purpose of the argument hereunder, whether or not there was any actual difference is immaterial, for the issue raised here is whether or not the filed rate had any bearing whatever upon the question presented to the Court.

This issue depends wholly upon the determination of another issue, to wit: Was the defendant in this particular

activity acting as a public utility, as such?[8] It is at this point that the whole evidence demonstrated unequivocally and without dispute that defendant was not acting as a public utility in this particular operation.

It is noted, as pointed out above, that plaintiff alleged and defendant admitted that defendant was an Arizona public utility. The allegation and the admission however, referred only to the general status of defendant and it has been defendant's position throughout that, while admitting that defendant was a public utility, generally speaking, it was not acting as a public utility in the making and performance of the contract presently in issue, but in that respect was engaged in a private activity in its private capacity; see, for example, defendant's Supplement to

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8. To the effect that the issue last stated is the primary issue, see the language of the Supreme Court of Washington in *Sunset Shingle Co. v. Northwest Electric & Water Works,* 118 Wash. 416, 203 P. 978, to wit: "We may concede for present purposes that respondent is, generally speaking, a public service corporation; that is, that its principal business is rendering public service to the City of Montesano, and the inhabitants thereof, in furnishing electric energy for light, and that as to such service, it is subject to the regulatory provisions of our public service statutes as to uniformity of rates charged and quality of service rendered. *But it does not follow that every act and thing done by respondent, even though it be in a sense service rendered to a person or corporation in compliance with the terms of some contract made by it with such person or corporation, is a public service, subject to the regulatory provisions of our public service statutes.* In controversies such as this, the question is not so much as to whether or not the corporation is a public service corporation—a general term often of very loose application when discussing public service problems—but whether or not *the service in question* is a public service. Manifestly our public service statutes and the administration of them have to do only with public service rendered by corporations engaged therein. *Therefore, let us not be led astray by the fact that respondent is, generally speaking, a public service corporation, but direct our inquiry to the question of whether or not the service here in question, agreed to be rendered to appellant by respondent, is a public service.* If it is not, then plainly the contract in question does not fail of its binding force upon respondent because of the provisions of our public service statutes." (Emphasis supplied.)

Motion to Amend Findings of Fact and Conclusions of Law, Paragraph 6 thereof.[9]

It is well established under Arizona law that the fact that an enterprise or business may be a public utility, generally speaking, does not render all of its activities public activities. Rather, it is well established that a particular enterprise can carry on varied activities, some public in nature and some private in nature. As stated in *City of Phoenix v. Kasun,* 54 Ariz. 470, 97 P.2d 210:[10]

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9. Paragraph 6 referred to above requested the Court below to amend Finding of Fact No. 3 to read: "That the defendant is a corporation doing business as a public utility at Kingman, Arizona; *that, however, in the making and performance of the contract here in issue, said defendant was not dealing as a public utility, as such, but was dealing in a private capacity under private contract to perform what it was not under a duty to perform without said contract.*" (T.R. 28-29)

10. The facts of this case are briefly as follows: The City of Phoenix, a municipal corporation, operated a water system and was providing water service to certain users outside the city limits. Kasun, petitioner, was among such users. Respondent city proposed to increase the rates for these services and Kasun sought an injunction enjoining such increase upon the ground that the proposed rates were unreasonable. The city answered Kasun's complaint by alleging that the service rendered by the city was not one of public duty but of voluntary contract. Appeal was taken upon the above ground from an order granting petitioner the injunction prayed. The Arizona Supreme Court held that the distinguishing characteristic of a public utility is the devotion of private property to such a use that the public has a right to demand service with reasonable efficiency and under proper charges, and that this raised a duty to serve by implication of law, and that this legal duty was the basis of the right of public authorities to control the rates to be charged. However, the Supreme Court also held that not every activity is a public service, but that a public utility may act in a private capacity subject to the same rules as any private contracting party. It further laid down the rule that whether a particular function is a "public service" or a "private activity" depends upon whether the legal duty to serve is present without contract, and that if the same is not present, then the right to be served can be based only upon contract, which contract "is subject to review by the Courts only in the same manner as any other private contract". The case then discusses the particular facts and circumstances present in the case and concludes that the city had no obligation, as a matter of law, to furnish service to Kasun and Kasun's only right

> "But the fact that a business or enterprise is, generally speaking, a public utility, does not make every service performed or rendered by it a public service, *but they may act in a private capacity,* and in so doing are subject to the same rules as any other private person so acting." (Emphasis supplied.)

Therefore, in this case the defendant, although a public utility, generally speaking, need not necessarily have been considered as having acted as such. Rather than that, Arizona law firmly establishes that the defendant, as a public utility, was perfectly able to "act in a private capacity", and in that capacity to be "subject to the same rules as any other person so acting", provided only that a situation proper to the exercise of that ability was presented to the defendant.

It is therefore necessary to examine the facts bearing upon the contract in issue to learn whether its performance constituted a "public service" or activities in a "private capacity". However, to give effect to these facts, it is necessary to see what test is applied under Arizona law to determine whether a particular activity falls within the class of "public service" on the one hand, or that of "private capacity" on the other. This test has been clearly stated in *City of Phoenix v. Kasun, supra,* where the Arizona Supreme Court said:

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to such service depended upon his contract with the city, which, under the rules stated above, could not be reviewed by the Court except under the rules "applying to private contracts in general". The judgment of the lower Court was therefore reversed with instructions to vacate the injunction and dismiss Kasun's complaint. The rule of the *Kasun* case is not confined to Arizona; see 73 C.J.S. Public Utilities, Sec. 9, P. 1003, and cases cited, and 51 C.J., Public Utilities, Sec. 19, P. 8, and cases cited, for cases from other jurisdictions; because of the state of the governing law, enunciated in the *Kasun* case, we do not deem it necessary to burden the Court with other authorities.

> "Since the basis of the right of regulation is that a duty is owed the public, regardless of a contract, it follows as a corollary that *when the duty which arises is based purely upon contract and not on law, express or implied, the situation is governed by the rules applying to private contracts in general,* notwithstanding that one of the parties may be operating a public utility". (Emphasis supplied.)

Briefly analyzed, the above rule of law declares simply that the nature of a particular activity is to be determined, not by any rule of thumb, but by the acts which are done under the particular circumstances presented, as to which Arizona law declares that if the service rendered is rendered under a duty which the enterprise had, even without a contract, then the service rendered is a "public service", but if the service is rendered not as a result of such legally imposed duty, but as the result of a contract, without which no duty would exist, then the activity is a "private activity".

Therefore, the *Kasun* case clearly establishes two points: 1) That defendant, although a public utility, generally speaking, was free to engage in private activities; and 2) That whether or not its particular activity in this case constituted a public service on the one hand or a private activity on the other, depends wholly upon whether or not it had a duty to act as it did, without any contract requiring such action, under the particular circumstances presented herein.

Now to the facts: It is established by the record that when plaintiff undertook construction of the subject housing project it had been contemplated that each of its 120 units would be serviced by an individual meter. Negotiations with defendant were therefore conducted upon this basis. However, when the project passed from the planning stages to actual construction, it was discovered by both parties

that the contemplated individual meters were not and would not be available due to wartime shortages brought about by World War II. Thereupon, plaintiff conformed its construction plans to the material-supply situation, and the project was constructed so as to supply the entire 120 units through four "master meters". Thereafter plaintiff tendered to defendant a certain written contract (Plaintiff's Exhibit 2 in evidence)[11] embodying provisions whereby defendant would provide water services through "a master meter or meters" (See Paragraph 5, Plaintiff's Exhibit 2 in evidence), and whereby "the readings of all such master meters will be totalized and considered as one for the purpose of rates and billing * * *". (See Paragraph 6, Plaintiff's Exhibit 2 in evidence.) We believe that it cannot and will not be contested that this written contract amounted in law to a request by plaintiff, as a customer, to defendant, as a public utility, to render services upon the terms embodied in said contract, to wit: to render service through "master meters".

Nor is there any dispute whatever that defendant refused to render service upon the terms proposed by plaintiff. Defendant's refusal is of record herein, evidenced by a letter from defendant's then counsel to plaintiff (T.R. 53-54), advising plaintiff that "the proposed agreement is not satisfactory". The letter further requested plaintiff to send its representatives to discuss the situation. Thereafter such representatives did meet with defendant's president, as a result of which an oral agreement was arrived at, the substance of which was that defendant would provide water service through the master meters and upon the terms proposed in the written contract theretofore tendered by plaintiff, provided however, that the terms proposed by said written contract be modified so as to provide that

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11. This exhibit was not printed in the Transcript of Record. It is set out in full in the appendix at the close of this brief.

billings for water so provided would be made "as if" there were an individual meter at each unit. Thereafter and upon the basis of this oral agreement, defendant did provide water service and deliver water through the master meters.

Now: Arizona law, as set down above, provides that if what was done by defendant—i.e. providing water service, under these circumstances, through master meters—if this was done pursuant to a duty which existed *without* the contract, then the service rendered would be a "public service" and defendant would be acting as a public utility and governable as such; however, the law also specifically provides that if there was *no duty* to do what was done *apart from such contract,* then the service rendered would be a "private activity", free from all regulation bearing upon public utilities and "governed by the rules applying to private contracts in general"; *City of Phoenix v. Kasun, supra.*

The question then is strictly this: Was defendant herein, apart from its oral contract with plaintiff, under a duty to render service to 120 separate dwelling units through the plaintiff's master meters and to make charges solely upon the basis of the amounts of water delivered through the master meters? In that regard, the law is quite clear, not only that defendant did not have such a duty, but that defendant was lawfully entitled to refuse to render such service. Moreover, as the evidence shows, defendant did, in fact, refuse to render such service and conceded to render such service only upon the condition that billings would be made "as if" the conditions upon which defendant could lawfully insist did exist in fact.

To point out defendant's lack of duty in this regard, it is necessary to analyze precisely what it was that defendant was requested to do. The conditions under which the plain-

tiff proposed that defendant should serve and under which defendant finally did serve (provided however, that billings be made "as if" there were 120 individual meters) were somewhat unusual. The proposed agreement between the parties specifically provided that after the water passed the "point of delivery" (i.e. a designated master meter), the water would cease to be the property of defendant and would become the property of plaintiff (see Paragraph 18 of plaintiff's Exhibit No. 2). The agreement further provided that plaintiff would own and operate the entire "secondary water distribution system" of the housing project (see Paragraph 14 of plaintiff's Exhibit No. 2), and specifically provided "that the government may sell or otherwise distribute water to the tenants as an incident of tenancy", (see Paragraph 15 of plaintiff's Exhibit No. 2). The situation was therefore one in which the plaintiff, as "landlord" of 120 individual tenants, proposed to buy water outright from the defendant (by purchase of the same through a single master meter, and by payment of a single minimum charge) and thence, as owner of the water, to redistribute and resell it to the 120 individual tenants.

On this point the law is quite clear: a public utility is under no duty whatever to provide service under such circumstances; and the law is equally clear that a public utility may lawfully refuse to render service under such circumstances: *Sixty-seven South Munn, Inc. v. Board of Public Utility Commissioners,* 106 N.J.L. 45, 147 Atl. 735; affirmed, per curiam, 107 N.J.L. 386, 152 Atl. 920; certiorari denied, 283 U.S. 828, 75 L.Ed. 1441, 51 S.Ct. 352; *Lewis v. Potomac Electric Power Co.* (C.A. Dist. Col.), 64 Fed. 2d 701; *Moebs v. Potomac Electric Power Co.* (C.A. Dist. Col.), 64 Fed. 2d 703 (no opinion; this case follows *Lewis v. Potomac Electric Power Co., supra,* which was dispositive); *Florida*

Power and Light Co. v. State of Florida ex. rel. Malcolm, 107 Fla. 317, 144 So. 657; *Karrick v. Potomac Electric* (Supreme Court, District of Columbia), P.U.R. 1932 C, 40.

The foregoing cases each meet substantially the same question and reach substantially the same result, although the reasons supporting the several decisions differ in certain particulars, which shall hereinafter be pointed out. However, despite the fact that each of said cases depends upon its particular facts, just as the instant case must be governed by the facts peculiar to itself, it is submitted that the facts in the foregoing cases, in each case, are so far similar to those of the instant case as to make the rules of law therein laid down wholly applicable, particularly in view of the pronouncements of the Arizona Supreme Court in *City of Phoenix v. Kasun, supra,* stressing the duty element of a public utility as the keystone of the dividing line between the right of public authority to regulate and the right of the enterprise to engage in private contract.

Under the rule of *City of Phoenix v. Kasun, supra,* it is apparent that a duty without any independent contract raising such a duty is essential to stamp defendant as a public utility. The question of whether such a legal duty existed herein can be settled by analysis of the proposition of whether or not defendant could have been compelled to serve upon the terms originally proposed by defendant. It is largely in this manner that the foregoing cases met and decided the above question, and the question will therefore be accorded similar treatment herein.

In the case of *Sixty-seven South Munn, Inc. v. Board of Utility Commissioners, supra,* petitioner, which was the owner of an apartment house, brought certiorari to review an order of the Public Utility Board refusing to compel

the electric and gas company to deliver electricity to petitioner at its apartment house through a master meter, the commodity then to be redistributed and resold by petitioner, through its agent, to the individual tenants. The issue, as stated by the Supreme Court of New Jersey, was whether the electric and gas company would be compelled, contrary to its policy, to sell to petitioner on this basis. The contention of the petitioner was that it was "entitled as of right to be supplied at its master meter with electricity at wholesale rates, which electricity it may then redistribute and resell to its tenants", and the answer to this contention was declared by the New Jersey Supreme Court to resolve the entire controversy. In denying petitioner's contention, the Court declared that both the rights of the company and the rights of the public were to be considered. Regarding the company, it was seen that "a very real competition" might result if the utility should be compelled to submit to the practice, for each square block might then be placed in similar operation, resulting in competition with the utility "for sales and delivery to the various users within the block". As to the public, the Court cited the duty of the electric and gas company, as well as the respondent board, to avoid discriminatory practices, but explicitly decided that they could find nothing discriminatory in the refusal of the company to render the requested service provided such practice was uniform. The Court concluded that such refusal in all aspects was "quite within its lawful discretion".

So stated, the *Munn* case reduces itself to two propositions: 1) A utility, to avoid creating competition with itself, may refuse to serve through master meters where such service is destined for redistribution to a number of tenants, and 2) Such refusal is based not only upon the right of the

utility to protect its revenues, but upon the public interest which is inherent of all the affairs of a public utility, to wit: Non-discrimination between ultimate users. We note with interest that certiorari was denied in the United States Supreme Court.

So viewed, it is impossible, with reason, to distinguish the *Munn* case factually from the instant case, for it is undisputed that plaintiff requested water service through master meters for resale through a secondary water distribution system to individual tenants, (Plaintiff's Exhibit No. 2 in evidence), and that defendant declined to do so. So far as "uniform policy" may be concerned, it is further undisputed that during the period of time which was material herein, defendant billed other consumers upon exactly the same basis as that of which plaintiff now complains, to wit (T.R. 66):

> "Q. Directing your attention to the years 1944 up to July of 1951, Mr. George, did the Kingman Water Company bill other residential services in Kingman, Arizona, on the same basis?
>
> A. Yes.
>
> Q. Now, with respect to services to multi-family units other than the Vista Solana project, did you have any such services during that period?
>
> A. A few small ones.
>
> Q. Can you give me an example of one?
>
> A. Well, let's see. We could take the Windsor Apartments, for one. That is four apartments.
>
> Q. How many meters did the Windsor Apartments contain?
>
> A. One meter."

Therefore, it is seen that so far as material features are concerned, the instant case is wholly in point with the *Munn* case. It follows that the result of the instant case must be the same, to wit: that as a matter of law defendant herein

was not compellable to render the service which it agreed to render pursuant to its contract with plaintiff, due to the fact that it had no legal duty to render the same, without said contract, from which it follows that in doing what it did, it was acting in a private capacity and not as a public utility. *City of Phoenix v. Kasun, supra.*

The case of *Lewis v. Potomac Electric Power Company, supra,* and the related case of *Moebs v. Potomac Electric Power Co., supra,* both present substantially the same facts and reach substantially the same conclusion, but add increased stress to the right of the utility to protect its revenues. For example, in the *Lewis* case, the power company involved had been selling current to the owner of a store and apartment building, which the owner then redistributed and resold to the individual tenants. The power company, by notice to the owner, declined to furnish further current upon that basis and threatened to discontinue the service. It was the power company's plan to collect from each tenant upon the retail rate basis currently being charged other similar users. The issue, as stated by the Court of Appeals for the District of Columbia, was: "The question which we have to decide is whether the power company may adopt a rule not to furnish electric current to a property owner unless the latter will agree not to re-meter and resell the current to his tenants". The Court held that the utility lawfully could make such a rule, and that under purview of such rule could lawfully refuse to render such service. The Court declared that the reasons for the rule were obvious, in that "it secures equality of rates and of service and prevents rebates and discrimination", and declared further that it was "reasonable protection to the revenue of the company, and this it had a right to do".

Again, it is seen in the *Lewis* and *Moeb* cases that the rules laid down in the *Munn* case, *supra,* are followed by the Court of Appeals for the District of Columbia, and that the duty to prevent discrimination and the right to protect revenue are asserted. Such being the case, the result in the instant case, which presents no material factual departures, must be the same.

A similar factual situation is presented in a slightly different light in the case of *Florida Power and Light Company v. State of Florida ex. rel. Malcolm, supra.* In that case the power company was providing service to individual tenants through individual meters. The plaintiff brought mandamus to compel the power company to remove the individual meters and to install master meters in lieu thereof, from which the plaintiff planned to redistribute and resell the current, as the plaintiff saw fit. It was held by the Supreme Court of Florida that mandamus would not lie because the company was not compellable to render service upon the basis proposed by the plaintiff. In so holding, the Court said "It is entirely lawful and reasonable, in the absence of valid statute or franchise obligation to the contrary, for a public utility company to refuse to extend its service to one who proposes to resell it in competition with it".

While it might be conceded in the instant case that the loss of revenue resulting from the sale through master meters to the plaintiff would have been relatively limited in scope, yet it cannot be denied that the direct result would have been (and, in fact, will be if plaintiff prevails herein) the depriving of defendant of the 120 individual service charges which it was entitled to make to the 120 individual ultimate consumers. It is therefore submitted that the question of competition and of protection of revenues is clear

cut; see, for example, *Karrick v. Potomac Electric Power Company, supra,* in which the facts were substantially the same as in each of the above cases, and where the Court said:

> "* * * to permit *any device* whereby electric current is not sold by the defendant to the ultimate consumer at rates which are under governmental regulation and just and reasonable, but does permit electric current to be sold to a middle man at rates which may or may not apply to the ultimate consumer, *will affect the net revenues of the defendant and be against public interest and public policy.*" (Emphasis supplied.)

It thus appears upon the undisputed facts herein and upon the law, set out above, that the following occurred in this case: Individual meters had been contemplated for use in the subject housing project, but they were not available; therefore it was necessary to employ "master meters" in lieu thereof; that plaintiff thereupon requested defendant to provide service through the master meters under conditions which provided that thereupon plaintiff could redistribute and resell the water so delivered to it; that defendant specifically refused to serve under such circumstances; that defendant's refusal was wholly lawful for the reason that it had no duty to provide service under such circumstances; that thereupon defendant, by express contract, agreed to do what it was not otherwise under a duty to do by insisting that charges be made "as if" meters were there.

From this it follows, under the law laid down under the rules of *City of Phoenix v. Kasun, supra,* that "the situation is governed by the rules applying to private contracts in general" and "subject to the same rules as any other private person so acting", which rules we respectfully submit did not include regulation of rates by the Arizona Corporation Commission, for it is axiomatic that only the public

activities of a public utility are so governable and that "the rules applying to private contracts in general" are wholly without the sphere of regulatory statutes bearing upon the activities of public utilities as such.[12] It is therefore clear beyond all doubt that in this case defendant was acting in a private capacity and was not subject to the regulatory statutes or the tariff rate upon which plaintiff's case below was predicated. It follows that Issue No. 1 stated above must be resolved in favor of defendant and the judgment of the Court below reversed for the reason that, in addition to the errors of law pointed out above, the judgment, as the same presently stands, compels defendant, acting in a private capacity, to serve at rates and under regulations applicable only to public utilities acting as such, and that as such, the judgment thereby contravenes the Fifth Amendment to the Constitution of the United States of America in that it deprives defendant of its property without due process of law and constitutes the taking of private property for public use without just compensation.

We respectfully submit that, in the premises, the District Court's Findings of Fact Nos. 3 and 7, which purport to fix defendant's capacity as a public utility, are unsupported by and contrary to the law and the evidence adduced upon this cause, and that its Conclusion of Law No. 3, to the effect that any agreement between the parties at a rate different from that filed with the Arizona Corporation Commission would be void, is contrary to law for the reason that upon the undisputed evidence, and as a matter of law, defendant was in no wise bound by the rate on file with the Corporation Commission, nor was it bound by any regulatory stat-

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12. The rule is so stated in *Sunset Shingle Co. v. Northwest Elec. & Water Works*, 118 Wash. 416, 203 P. 978, quoted *supra*, footnote 8, p. 17, this brief; identical rule is also implicit in *City of Phoenix v. Kasun, supra.*

utes of the State of Arizona bearing upon the activities of public utilities.

It is well to note at this point that the conclusion herein advanced is the precise conclusion reached by the Arizona Corporation Commission when this same case was brought before that body in 1952. As hereinabove noted (Statement of the Case) the Corporation Commission, by decision handed down December 20, 1952 (Defendant's Exhibit A in evidence: T.R. 56-57) declared that it lacked jurisdiction of this precise controversy upon the ground that it involved a contest "between *private* litigants". We respectfully submit that the facts and the law admit of no other conclusion.

II. (Issue No. 2).

The second issue involved herein is: assuming, *arguendo,* that defendant was acting as a public utility in the making and performance of the contract here in issue, which defendant denies, was there, in fact or in law, any true variance between the rates charged and paid by plaintiff and those on file with the Corporation Commission? We assert that there was not.

A. VARIANCE AS A MATTER OF FACT.

Such variance, if any, is to be found between the facts as they occurred and the language of "Tariff No. 1" (plaintiff's Exhibit No. 1 in evidence; T.R. 40-41). In that regard it will be recalled that defendant's tariff rate provided as follows: "All connections metered * * * $2.50 minimum rate of 3000 gallons". The question, then, was one of construction, to determine what the tariff allowed by determining what it meant.

In that regard, plaintiff has adopted the position that since the tariff provides "all connections metered" the mini-

mum rate" could apply only on a "per meter" basis.[13] In other words, the Government has contended that the stress is to be laid on the number of meters in use rather than the number of units or consumers served. Reduced to its final analysis, the Government's contention is that in order to justify minimum charges for each of the 120 units there would have to have been an actual physical meter at each of the 120 units. In support of this contention plaintiff has argued and the lower Court has found: (see Conclusion of Law No. 4) that "any ambiguity (i.e. whether a "per meter" or a "per unit" basis was to be followed) in the filed rate must be resolved against defendant, since such rate was prepared by defendant and submitted by defendant to the Corporation Commission for approval; so construed, the rate does not permit the charge of a monthly $2.50 minimum per residence unit" (T.R. 15).

The foregoing conclusion supporting plaintiff's position that the tariff must be construed against defendant upon the ground that it was prepared by defendant is a well known rule of construction in Arizona (see cases, *infra,*). However, it is our position, and we respectfully submit, that the application of the above rule of construction in this case is and has been wholly erroneous.

As mentioned above, it is conceded to be the established rule of construction in Arizona that an ambiguous writing is to be construed most strongly against the party who prepared it; see, for example, *Gardner v. Trigg,* 59 Ariz. 377, 129 P.2d 666; *Covington v. Basich Bros. Construction Co.,* 72 Ariz. 280, 233 P.2d 837; *Central Housing Investment Corp. v. Federal Nat. Mortgage Ass'n,* 74 Ariz. 308, 248

13. Plaintiff's premise itself (i.e. that the number of meters, rather than the number of consumers, governs) is contrary to law, apart from any question of construction; this is hereinafter more fully developed; see "B. Variance as a Matter of Law", this section.

P.2d 866. These cases establish a "rule of strict construction", as the rule has been referred to in a subsequent Arizona case (see *infra*), which rule has been applied with full force in this case. However, the rule as laid down by the above cases does not accurately represent the present state of the law in Arizona, for in a later case, *Hamberlin v. Townsend,* 76 Ariz. 191, 261 P.2d 1003, the rule of the foregoing cases has been elaborately discussed and extensively qualified, and, as will be seen, the *Hamberlin* case, *supra,* indicates without doubt that this "rule of strict construction" has found misapplication herein in having been applied in its raw and unqualified state to this defendant. The misapplication spoken of is found in two separate areas.

First, there is a largely technical misapplication, which is none the less material. In the *Hamberlin* case, *supra,* the plaintiff sought to apply the "rule of strict construction" upon the ground that defendant therein had prepared the writing. In discussing this contention, the Supreme Court of Arizona quoted with approval from 17 C.J.S. Contracts, Sec. 324, and said:

> "Where a contract is ambiguous, it will be construed most strongly against the party preparing it or employing the words concerned which doubt arises, the *reason for the rule* being that a man is responsible for ambiguities in his own expressions and *has no right to induce another to contract with him on the supposition that his words mean one thing while he hopes the Court will adapt a construction by which they would mean another thing,* more to his advantage; * * *" (Emphasis supplied.)

Thus, as stated by the Arizona Supreme Court, the reason for the rule is based upon the fact that the party preparing a writing has no right to mislead the other party or to induce the other party to act to his prejudice. It is axiomatic

in the law that where the reason for a rule fails, the rule fails with it, for there is neither logic nor justice in applying a rule which has no reason to support it. If this is true, then the "rule of strict construction" applied herein must totally fail for it is undisputed upon all the evidence that plaintiff knew at all times, and had been so informed by defendant, that defendant looked upon the tariff as authorizing and requiring a minimum charge "per unit", that defendant intended to make its charges accordingly, and that plaintiff agreed to pay charges in accordance therewith. It therefore appears that there was no "misleading" or "inducing" by reason of "ambiguous language" in the tariff—rather, the defendant declared what it intended to do and did exactly what it had declared it would do. Therefore, with the very reason for the rule absent, there is no basis whatever for the application of the rule applied. As between the parties, they knew what interpretation was being attached to the tariff, and they acted in accordance with their knowledge in that regard.

While the foregoing ground of misapplication is somewhat technical, the second ground of misapplication is the more important and is not merely technical in any sense of the word, but pragmatic, for the second ground demonstrates the misapplication of the rule as a whole, due to utilization of the rule as an unconditional rule of law and without reference to cogent surrounding circumstances. In the *Hamberlin* case, *supra,* after stating the foregoing rule and its reasons, the Arizona Supreme Court went on to say, continuing to quote from 17 C.J.S., Contracts, Sec. 324:

> "But the rule, it is said, is the *last one* which Courts will apply, and *then only if a satisfactory result cannot be reached by other rules of construction* * * *" (Emphasis supplied.)

The Court then went on to state what these "other rules of construction" were, by quoting from 17 C.J.S., Contracts, Sec. 309 (previously cited with approval in *Smith Stage Co. v. Eckert* 21 Ariz. 28, 184 P. 1001):

> "Where two clauses are inconsistent and conflicting, they must be construed so as to give effect to the intention of the parties as collected from the whole instrument, and apparently conflicting provisions *must be reconciled,* rather than nullify any, *if reconcilation can be effected by any reasonable interpretation,* it being *necessary* for this purpose to consider the entire instrument *and the surrounding circumstances.*" (Emphasis supplied.)

It thus appears under the rule of the *Hamberlin* case, which is the most recent pronouncement of the Arizona Supreme Court on this subject, that the "rule of strict construction" which found application in this case may be applied only where apparent ambiguity cannot be reconciled by any reasonable interpretation, and that in determining whether there is any such reasonable interpretation, surrounding circumstances must be considered. It is our position not only that there exists such a "reasonable interpretation" and not only that it is supported by "surrounding circumstances", but that when the surrounding circumstances are considered, there is one, and only one reasonable interpretation, and that the same is not only supported by the surrounding circumstances, but actually compelled by them!

First, it is well to bear in mind that the tariff rate, which is the source of ambiguity herein, was filed with the Corporation Commission in the year 1919, when, it is to be fairly assumed, there were none of the wartime shortages which existed in the years 1943-44. Secondly, the evidence amply demonstrates that it was the virtually universal prac-

tice in Kingman, Arizona, to employ individual meters for each water service. Third, the evidence demonstrates that the original plans for the construction of the Vista Solana housing project contemplated use of such individual meters at each of the 120 units therein contained. If such individual meters had been installed, as originally contemplated, and in accord with the regular practice, the service rendered would have afforded plaintiff the same service at the same rate and in the same manner as was then being provided to other users in like circumstances in the same area.

However, what had been contemplated did not come to pass, for most unusual circumstances presented themselves: these circumstances were manifested in the form of severe material shortages brought about by World War II which made the use of individual meters at the housing project impossible. It is readily seen from the record that had it not been for these material shortages the 120 individual meters would have been installed. Had this been the case there would be no doubt whatever that defendant would be entitled to retain all of the charges which plaintiff seeks to recover. However, as a direct result of these shortages, the individual meters could not be employed and four master meters were substituted in lieu thereof.

What then happened is almost too plain to require statement. It is simply this: As a matter of revenue, defendant was authorized[14] to receive 120 minimum rates and would have received 120 minimum rates through 120 individual meters, except that such individual meters were unavailable. Moreover, defendant was required, in order to avoid discrimination against other users[14] to receive 120 minimum rates, and would have received the same through 120 indi-

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14. The authorization and the requirement, respectively, are fully established by the *Munn* case, *Lewis* case, *Florida Power* case, etc., *supra,* Argument I, Issue No. 1, this brief, page 14, et seq.

vidual meters, except that such individual meters were not available. Therefore, in the absence of the actual physical meters, it was simply agreed between the parties that the charges to be made to the plaintiff would be made "as if" they were there, and the parties, by their contract, employed the contract as a "fiction" for billing purposes to equalize the plaintiff's charges to rates then being paid by any other water users and to equalize the rates to what would have been the case had the meters been available.

It therefore appears, when surrounding circumstances are considered, that the whole purpose and intent of this contract between the parties was merely to point out the right of the defendant to receive the minimum charges which it clearly would have been entitled to receive in the absence of these unusual circumstances. The filed tariff, which was promulgated in the year 1919, certainly did not envision a situation where individual meters would be absolutely unavailable, and we believe it is obvious to any reasonable mind that the plain intent of the tariff on file with the Corporation Commission was that a minimum charge of $2.50 was authorized for each "connection"—that is, each residential unit served by defendant—notwithstanding that an actual physical meter could not be used thereat (see "B. Variance as a Matter of Law", *infra*). It is perhaps true, all things considered, that the tariff "contemplated" the use of such meters, and this fact is supported by the fact that individual meters were then the almost universal practice in Kingman, Arizona. However, it must be borne in mind that this "contemplated fact" had its basis in the material-supply situation existing in 1919 when no shortages were present, and we respectfully submit that what may have been a "contemplation" in 1919 is not a "requirement" in 1944, when such meters were absolutely unavailable. It is therefore seen that the whole purpose of the contract, as

well as its actual result, was to conform the charges paid by plaintiff to those permitted and required by the tariff, the sole and only "variance" being that 120 actual meters were not available; there was no variance in *rates* at all! Plaintiff did not pay one penny more or one penny less than anyone else who received service of this defendant during this period; as stated by I. M. George, president of the defendant, when asked if he negotiated the terms for water service on behalf of defendant:

> "Well, I presume you would say that I negotiated the terms for the water service to them, yes; *but the law has provided the amount we should charge for that service"* (T.R. 81) * * * *"these charges were not any different from those made to anybody else in the community,* what they were paying for the service. *It was the same service charge. It was $2.50 for a minimum of 3000 gallons per month"* (T.R. 86). (Emphasis supplied.)

Therefore, the only "difference" between services rendered to plaintiff and services rendered to others was that the others had individual meters, whereas plaintiff did not—and plaintiff did not have individual meters solely because of wartime conditions. Such "difference" or "variance" as may have existed by reason of that fact was plainly not a difference which resulted in a change in the rate charged, but was merely a difference in the manner by which the water was delivered. In the one case water would pass through 120 individual meters, in the other case it would not; but in either case, the quantities of water and the charges therefor would be identical. We respectfully submit that under the statutes prohibiting variances, this is no variance at all, inasmuch as the statutes upon which the Government relies (set out in Argument, I, Issue No. 1, Page 14, this brief) prohibit only variance in *charges* and

not variance in the manner by which service is provided. As the statute (Sec. 40-374, A.R.A., *supra*) provides, the prohibition is only that "no public service corporation shall charge, demand, collect or receive a greater, less or different *compensation* * * * for any product or commodity * * *".

We therefore respectfully submit that the position of the plaintiff in insisting that actual physical meters were required to warrant the minimum charges made is inequitable and wholly untenable, when, upon the facts, it is seen that the plaintiff knew that such meters were unavailable from any source, and in accordance with that knowledge, agreed to pay for service "as if" such meters were there, in order to induce defendant to provide such service. We believe that it is plain, upon all the facts, that the whole result of the instant contract was one of attempted conformance to the statute, rather than variance with it, and that plaintiff's argument seeking to apply a "rule of strict construction" to a writing prepared in 1919, when circumstances were so far unlike those of 1943-44 as to defy imagination, smacks of a nicety which the law cannot and will not tolerate. As the Supreme Court of Arizona has declared: "It is necessary for these purposes to consider * * * the surrounding circumstances". In that regard, we respectfully say that if any circumstances were ever deserving of consideration, the conditions brought about by World War II are deserving of such, and that to ignore them constitutes prejudicial error in and of itself, for there is no doubt whatever that except for these circumstances plaintiff would be utterly without any right to have the judgment to which it now clings.

B. VARIANCE AS A MATTER OF LAW.

Quite apart from the question of misapplication of rules of construction, it is clear that the Court's Conclusion of

Law No. 4 is contrary to law. As pointed out *supra* (footnote 13, page 32), plaintiff's position and the Court's finding is that the filed tariff "does not permit the charge of a monthly $2.50 minimum per residence unit". Obviously such position and finding purport to lay stress upon the number of meters employed rather than the number of consumers served. We think that merely to state the proposition is to refute it, for it ought to be plain beyond all argument that the service which is rendered by any public utility is not rendered to a number of mechanical devices, but to those persons who use the commodities delivered!

In that regard, we direct the attention of the Court to *Brubaker and Bros. v. Millersburg Water Company* (Pennsylvania Public Service Commission), P.U.R. 1928 A, 808, for not only is the rule so declared therein, but the facts of that case are virtually identical to those herein, to wit: complainant owned a business block, containing stores, apartments, etc., the whole comprising 16 individual tenants. Respondent water company had requested installation of individual meters, which complainant did not do; rather, a single master meter was installed on the service line, and all 16 tenants received water service therefrom. Thereupon, the utility assessed a minimum service charge for each of the tenants so served. The complainant then brought action before the Commission, alleging an overcharge by reason of the utility's assessment of multiple minimum charges instead of applying the published rate to the master meter on the basis of the registered consumption. The issue was whether the utility could properly assess minimum rates for the number of consumers, as was its usual practice. Held: the utility was properly charging 16 minimum charges for the premises in question. As against the complainant's argument that the lack of separate meters neces-

sitated a single minimum service charge merely, the Commission said, quoting from *Borough of South Fork v. South Fork Water Company* (Pennsylvania Public Service Commission), P.U.R. 1923 E, 814, which presented similar facts:

> "This reasoning is more plausible than sound, and if made the basis of the Commission's decision, would appear to discriminate in the distribution of the rate burden equally among all consumers. *This minimum rate is not a charge against the meter, but against the consumer* and it therefore follows that *each consumer should be charged the minimum rate although he may be receiving the water through one metered service line.* * * * so long as different consumers make use of the same service line, *the Commission is not convinced that respondent is violating its filed tariff by charging the minimum rate for each consumer in the line, and after the combined minimum rates have been exhausted, charging for the water thereafter used at the 1000 gallon rate.*" (Emphasis supplied.)

We think it unnecessary to say more than that the billing practice approved in the *Brubaker* case is identical with the facts in the instant case and constitutes exactly what was done by defendant herein. It is therefore clear that the "$2.50 minimum rate" refers, as a matter of law, to the consumer and not to the meter, and that the tariff not only permits a "per consumer" charge but requires it.

Moreover, the rule laid down above finds full application in connection with multiple dwelling units similar to those in the Vista Solana project. See, for example, *Noble v. City of Troy* (Montana Public Service Commission), P.U.R. 1932 C, 256. There, the complainant owned a group of small buildings which were rented to tourists or others. The issue was whether these cottages or bungalows (similar to the "units" of the Vista Solana project) should be considered as one premise or as separate buildings for the purpose of

billing monthly water consumption. Held: the premises should be considered not as a single service but as a number of individual services. The order of the Commission was entered in accordance therewith. We respectfully submit that the plaintiff herein, as a landlord of tenants occupying 120 separate dwelling units, stands in like position and is therefore subject to like application of the law.

It therefore appears that the Court below was in error in making its Finding of Fact No. 8 and its Conclusion of Law No. 6, when it found that plaintiff was "overcharged" by defendant, for such conclusion is clearly belied by the record—plaintiff was charged no more than any other 120 users. Likewise, the Court erred in making its Conclusion of Law No. 3, which implies that the rate charged by defendant was different from that filed by the defendant with the Corporation Commission, for the undisputed evidence was that there was no "difference" or "variance" whatever as to rates, and that, on the contrary, the contract between the parties was a plain effort to see to it that plaintiff would not be charged either more or less than any other consumer, in spite of circumstances which would not permit the use of individual meters. Each of the above errors, of course, is based upon the Court's erroneous application of the law of the State of Arizona relating to construction of written documents, in that the Court failed to consider surrounding circumstances, the consideration of which cannot result, except in the absence of fairness and reason, in a construction permitting a "per unit" charge in the face of circumstances which rendered a "per meter" charge wholly impossible.

Moreover, apart from all consideration of misapplication of rules of construction, the finding of the Court that minimum charges could not be assessed upon the basis of the number of units was and is wholly contrary to law, for

"the minimum rate is not a charge against the meter, but against the consumer."

III. (Issue No. 3).

It is now and has long been the law of the State of Arizona that where money is paid voluntarily and under claim of right, with full knowledge of all facts, such money may not be recovered back, *Merrill v. Gordon,* 15 Ariz. 521, 140 P. 496; *Mody v. Lloyd's of London,* 61 Ariz. 534, 152 P.2d 951. Nor is Arizona alone in this view: as noted in *Merrill v. Gordon, supra:*

> "And this is the rule adopted by the English Courts, the Federal Courts and all the State Courts, except Georgia and Kentucky".

In the words of the Supreme Court of Arizona, speaking in *Merrill v. Gordon, supra,* the rule and its application are as follows:

> "* * * It is a familiar and well settled principal of law that, where a person with full knowledge of the circumstances pays money voluntarily, and without compulsion or duress of person or goods, he shall not afterwards recover back the money so paid" * * *
>
> "The general rule as to voluntary payment is stated in 30 Cyc. 1298, as follows:
>
> > 'Except where otherwise provided by statute, a party cannot by direct action or by way of set-off or counterclaim, recover money voluntarily paid, with a full knowledge of all the facts, and without any fraud, duress or extortion, although no obligation to make such payment existed.' * * *"

The *Merrill* case was subsequently followed in Arizona by the case of *Moody v. Lloyd's of London, supra,* where the Arizona Supreme Court quoted from the same general

rule set down in the *Merrill* case, and declared that it adhered to the rule stated therein. The Court also quoted with approval the assignment of error advanced by the appellant therein, to wit: "Payment made voluntarily and with full knowledge of facts precludes the payor from any recovery for such voluntary payment, *and a judgment granting such recovery is error*". (Emphasis supplied.) It is interesting to note that in both of the above cases the plaintiff-payor had judgment (i.e. recovered back monies voluntarily paid), that both cases were reversed on appeal and that the reversal in each case was with directions to the lower Court to dismiss the plaintiff's action.

If the foregoing represents the law of the State of Arizona, then it remains only to determine whether the case of plaintiff herein falls within or without the rules therein declared. In that regard, it is necessary to look no further than plaintiff's Complaint on file herein,[15] from which it is instantly apparent that said Complaint not only fails to state a claim upon which relief can be granted, but that the same states facts precluding recovery under the rule of the cases set out above. As such, the plaintiff's Complaint was attacked by defendant's Motion to Dismiss,[16] and denial of said motion is specified as error herein.

To determine the sufficiency of plaintiff's case it is necessary only to examine the allegations of plaintiff's Complaint to see what relief it was that plaintiff was seeking and upon what theory the same was sought.

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15. The full text of the Complaint has been set out in the appendix at the close of this brief.

16. It will be noted that the Motion to Dismiss was not filed until after judgment; in that regard, the defense of failure to state a claim may be made at any time and need not be pleaded in the answer. 2 Moore's Fed. Prac., Par. 12.07, p. 2241; *McLaughlin v. Curtis Publishing Co.* (S.D.N.Y. 1943), 7 F.R. Serv. 12(h) 22, Case 1.

In the first instance, it is apparent that plaintiff was seeking "recovery back" of money merely by reading the title by which plaintiff has denominated the complaint, to wit: "Complaint for Recovery of Overcharges". This fact is confirmed by a reading of the allegations of the Complaint itself, which, so far as material, may be summarized as follows: that plaintiff entered into a contract with defendant and that the contract was performed by both parties; that defendant rendered its statements for services to plaintiff and that said statements were rendered upon a certain basis of computation; that plaintiff paid said statements, with the exception of two statements for June and July, 1951; that the said basis of computation was erroneous and that plaintiff is therefore entitled to a "refund". Patently, the Complaint then is one for recovery of money paid upon an erroneous basis of computation.

If such is the case, and we contend that it cannot be otherwise, then it is axiomatic that plaintiff's case, to be sufficient, must be pleaded within the rules of Arizona common law as those rules bear upon the theory which the Complaint attempts to embrace. The applicable law has been set forth in the foregoing Arizona cases dealing with recovery of payments, and it therefore remains only to examine the plaintiff's Complaint to see whether the Complaint alleges facts sufficient to bring it within (or on the other hand, to take it without) the operation of those rules.

First, did plaintiff pay this money voluntarily? The Complaint itself alleges that to be the fact: statements were rendered and they were promptly paid. Nothing in the Complaint raises the slightest implication that the plaintiff's action in this regard was anything but voluntary.

Second, were the statements paid under claim of right? Again the Complaint evidences that they were, for the

Complaint alleges that defendant delivered quantities of water to plaintiff and rendered a statement therefor each month, each statement setting forth the amount of water billed and basis of its computation.

Third, did the plaintiff have knowledge of all of the facts bearing upon its payments? The Complaint itself again informs us that plaintiff did have such knowledge, for the Complaint alleges a contract between the parties, delivery of water by the defendant, that the "quantities of water so delivered were reported and billed" and that defendant "made its charges as though there were a separate meter at each of the (housing units)", and that "each such bill made the charge at the highest rate provided in the tariff (describing it)". As these allegations indicate, each of these matters was at all times wholly within the knowledge of plaintiff at the very times that the statements spoken of were rendered and paid. Moreover, plaintiff's Complaint concludes its allegations by reference to the "erroneous billing practice" of the defendant, stating that (notwithstanding that the practice was erroneous) "the plaintiff paid all of said billings except (two certain billings, describing them)".

Upon these allegations then, there can be no doubt whatever that plaintiff's case falls within the rules of Arizona law set out above, for the Complaint itself affirmatively establishes that in each case:

1) Plaintiff paid voluntarily;
2) Under claim of right; and
3) With full knowledge of all material facts.

As such, recovery on such a Complaint is clearly barred and "a judgment granting such recovery is error", *Moody v. Lloyd's of London, supra.*

So that there may be no doubt whatever as to the legal insufficiency of the Complaint, its sufficiency can also be

examined from a converse point of view. That is to say, Arizona law recognizes certain "exceptions" to the rule, as where there is "compulsion or duress of goods" or "fraud, duress or extortion", *Merrill v. Gordon, supra.* As heretofore stated, there is not the remotest sort of hint in any of the allegations of the Complaint of any kind of fraud, duress or anything whatever contrary to voluntary action.[17] Moreover, it is to be noted that under the provisions of Rule 9(b), Federal Rules of Civil Procedure, all averments of fraud or mistake and the circumstances constituting them must be pleaded with particularity. This was in no wise done. Patently, plaintiff's complaint was not within any "exception to the rule".

In short, taking every allegation of the Complaint as true, the law bearing upon overpayment of money is such as dictates that plaintiff is entitled to no recovery whatever. It knew all of the facts and it acted—no more is needed to preclude recovery, even though "no obligation to make such payment existed", *Merrill v. Gordon, supra.*

The rule seems harsh; it is, nevertheless, the law, and there are excellent reasons to support it; see, generally, the opinion in *Merrill v. Gordon, supra,* discussing this proposition. It is therefore merely a question of whether the facts of this case are proper to receive the application of the rule pointed out above. In that regard, the propriety of such application is obvious, it being necessary only to add that the law provides that the rule barring recovery of voluntary payments applies fully to cases in which payments for services are made to a public utility, *Illinois Glass Co. v. Chicago Telegraph Co.,* 234 Ill. 535, 85 N.E. 200;

17. Nor, it should be pointed out, were any such elements developed by evidence upon trial; the evidence certainly proved no more than was alleged in the Complaint, and indeed, a good deal less.

Swift and Co. v. Columbia Ry., Gas and Elec. Co. (CCA 4th), 17 Fed. 2d 46; *City of High Point v. Duke Power Co.* (CCA 4th), 120 Fed. 2d 866, and that the rule applies fully to cases in which the United States is the paying party. See: *Bull v. United States,* 295 U.S. 261, 79 L. Ed. 1428, 55 S. Ct. 700, citing with approval *McKnight v. United States,* 98 U.S. 179, 25 L. Ed. 115, in which the United States Supreme Court said:

> "the rules of law which apply to the Government and individuals are the same. There is not one law for the former and another for the latter."

More specifically, the rule has been expressly recognized in the Ninth Circuit as applying to bar the United States from recovering money voluntarily paid. See the opinion in *United States v. Skinner and E. Corp.* (D.C. Wash.), 28 Fed. 2d 373, at page 384, affirmed on the point of voluntary payments by the United States Court of Appeals for the Ninth Circuit in *United States v. Skinner and E. Corp.,* 35 Fed. 2d. 889, at page 896, where the Court of Appeals said, as to certain overpayments sought to be recovered by the Government:

> "* * * They are to be deemed *voluntary and not recoverable, whatever view may be taken of the true meaning of the contract.*"

Appeal was dismissed in the United States Supreme Court, 281 U.S. 770, 74 L. Ed. 1176, 50 S. Ct. 248.

In the premises, we respectfully submit that the lower Court's denial of defendant's Motion to Dismiss is and was reversible error and that plaintiff's Complaint and its action should have been and must be dismissed.

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be reversed with instruction to enter judgment for the defendant, Kingman Water Company.

Respectfully submitted,

Brice I. Bishop and
Donald R. Kunz
707 Title and Trust Building
Phoenix, Arizona
Attorneys for Appellant

(Appendix Follows)

Appendix

(Formal Caption of Court and Cause)

COMPLAINT FOR REFUND OF OVERCHARGES

1. This Court has jurisdiction under 28 U.S.C. 1345, in that the United States of America is the plaintiff herein.

2. The Housing Authority of Mohave County is an agency of the County of Mohave authorized to operate housing projects, under lease, for the Federal Government, pursuant to a state statute, to wit, the War and Defense Housing Law, Appx. 5(b) of the 1952 Cumulative Supplement to the Arizona Code, 1939.

3. The defendant is a corporation doing business as a public utility at Kingman, Arizona. By a lease dated July 17, 1944, but effective as of July 1, 1944, the United States of America leased to the Housing Authority of Mohave County a housing project known as Vista Solana Homes, consisting of 31 buildings and containing 120 dwelling units. Said Housing Authority agreed to operate said housing project, to sublet the housing units, and to pay to the United States, as rent, all net profits derived from the operation of said project. Said lease further provided, in Section 16 thereof, that the lessor, the United States of America, would be responsible for the negotiation and execution of contracts for water and electricity services but that the lessee would assume and discharge the obligations of the lessor and act as the representative of the lessor in dealing with the suppliers of utility services under any such contracts.

(Note: Complaint contains no Paragraph 4.)

5. Pursuant to the foregoing, the United States of America did enter into a contract with defendant Kingman Water Company for the supplying of water to the said

Vista Solana project, at the rates specified by the published tariff of the defendant applicable to such service. The applicable tariff was Tariff No. 1 dated August 2, 1919, filed on behalf of the defendant by I. M. George. A copy of said Tariff No. 1 is attached hereto, marked Exhibit A, and made a part hereof by incorporation.

5. From May 20, 1944, to July, 1951, the defendant delivered water to the said Vista Solana housing project through four meters owned and installed by the United States of America. The quantities of water so delivered were reported and billed, for each monthly period, solely on the basis of the amounts appearing on said meters. Nevertheless the defendant made its charges as though there were a separate meter at each of the 120 housing units in the project. Each such bill made the charge, at the highest rate provided in the tariff, for users of less than 3000 gallons, multiplied by 120. The defendant, in its monthly billings, made the further assumption, which was contrary to fact, that each and every one of the 120 units was occupied every month by a water user.

7. As a result of the erroneous billing practice hereinabove described, the defendant overcharged the plaintiffs a total of $15,824.33 during the period from May 20, 1944 to July, 1951. The defendant (sic) paid all of said billings except the amounts billed for June and July, 1951, which totaled $1,011.14.

8. The plaintiffs have fully performed all covenants and conditions on their part under the aforesaid contract between the United States of America and the defendant Kingman Water Company.

9. The plaintiffs sought to obtain relief by an application to the appropriate state regulatory body, the Arizona Corporation Commission. Said Commission, however, ruled that it did not have jurisdiction of the controversy.

10. By reason of all the foregoing facts, the defendant is indebted to the plaintiffs herein in the sum of $14,813.19, interest upon each overpayment from the date thereof at the rate prescribed by the statutes of Arizona, and the costs of this action.

WHEREFORE, the plaintiffs pray judgment against the defendant for $14,813.19, interest upon each overpayment from the date thereof, the costs of this action, and such other and further relief as may be just and proper.

(Signature of Counsel)

EXHIBIT "A"

WATER RATES OF

Name: KINGMAN WATER COMPANY

Filed by I. M. GEORGE

Address: KINGMAN- ARIZONA Date AUGUST 12-1919

(For details of this classification see text of accounting order, Page 5)

1.-b Commercial—Meter Rates

All Connections Metered. We Require $5.00 Deposit.
$2.50 Minimum Rate of 3000 Gallons.

3001 to 50,000 gals	.50¢	per Thousand
50,000 to 75,000 gals	.45	per Thousand
75,000 to 100,000 gals	.40	per Thousand
100,000 to 250,000 gals	.35	per Thousand
250,000 to UP gals	.30	per Thousand

(Fill in nothing below this line.)

File No. 105	Supplement to .....
Authority	Classification .....
Date Effective	Transferred to .....
Cancelled	Cancelling .....

Tariff No. 1

PLAINTIFF'S EXHIBIT NO. 2

Contract Between

THE UNITED STATES OF AMERICA

AND

KINGMAN WATER COMPANY

For the Supplying of Water

THIS CONTRACT, made and entered into this ..... day of ....., 194...., (To be dated at least 11 days prior to date of initial delivery.), between the United States of America, hereinafter called the "Government," and Kingman Water Company, a corporation organized and existing under and by virtue of the laws of the State of ...., hereinafter called the "Utility."

WITNESSETH:

WHEREAS, the Utility is now authorized to supply and is engaged in the process of supplying water to customers within the State of Arizona and inter alia to consumers within the area of Kingman; and

WHEREAS, the Federal Public Housing Commissioner, hereinafter called the "Commissioner," desires to contract for the supplying of water to the housing development consisting of approximately 120 units to be located in or near the City of Kingman, (Identification No. ARIZ-2331), hereinafter referred to as the "Development";

NOW, THEREFORE, in consideration of the mutual covenants herein contained and for other good and valuable consideration, the parties hereto agree as follows:

1. *Supply of Water:* The Utility shall, from the date of initial delivery to the expiration of this contract, supply the water requirements of the Development and of the tenants of the Development.

2. *Determination of Date of Initial Delivery:* The date of initial delivery hereunder shall be the date on which the Utility is first required to furnish water to the Development under the terms of this contract.

3. *Notice to Utility to Commence Delivery:* The Utility shall commence delivery of water to the Development on the date specified in a written notice from the Commissioner or his representative, such notice to be delivered to the Utility not less than ten (10) days prior to the date specified for the commencement of delivery.

4. *Term of the Contract:* This contract shall become effective upon the execution thereof and shall continue in effect for one year; provided, however, that in the absence of notice of intention to terminate served on the Utility by the Commissioner or on the Commissioner by the Utility at least thirty (30) days prior to the expiration of the contract, this contract shall continue for another year and from year to year thereafter until terminated by notice as outlined in this Section. This contract may also be terminated by the Government, if the Government shall sell or otherwise dispose of the Development or any part thereof. In case of such disposal, the Government shall advise the Utility of the date on which title will pass from the Government, at least ten (10) prior to such passage of title, and the Government's obligations under this contract shall cease on the date on which title passes. All obligations of the parties with regard to the rendition of service and payment therefor and with regard to the payment period herein provided for shall commence with the date of initial delivery as defined in Section 2.

5. *Mains and Meters:* The Utility agrees to furnish, install and maintain in proper working order water mains of ample and sufficient size to the metering point or points

of the Development, and to maintain in proper working order the necessary master meter or meters for the Development, without cost to the Government.

6. *Rates:* The Utility agrees to charge the Government and the Government agrees to pay the Utility for water services furnished to the Development under the terms hereof at the following rate per month:

First 3,000 gallons	$2.50 (minimum charge)
Next 3,001 to 50,000 gallons	.50 per 1000 gallons
Next 50,001 to 75,000 gallons	.45 per 1000 gallons
Next 75,001 to 100,000 gallons	.40 per 1000 gallons
Next 100,001 to 250,000 gallons	.35 per 1000 gallons
All over 250,000 gallons	.30 per 1000 gallons

It is understood that if more than one master meter is deemed necessary to register the consumption of water for said Development, the readings of all such master meters will be totalized and considered as one for the purpose of rates and billing as agreed to herein.

7. *Rate Revisions:* Nothing in this contract shall be deemed or construed to preclude the Government and the Utility from changing, amending, or revising the rates agreed to herein, provided the parties hereto shall mutually agree upon said change, amendment or revision. If the Utility shall reduce the general rates for water service in the area of Kingman, the rates herein named shall be reduced in proportion to such reduction.

8. *Reading of Meters:* The meters and metering equipment and instruments shall be read monthly by a representative of the Utility and the representative of the Commissioner. The Utility and the Commissioner, or his representative, shall agree upon a date or dates upon which the meters shall be read for billing purposes. This date shall be the same for each month of the year unless said date falls

on Sunday or a legal holiday in which case the reading shall be made on the next business day following the Sunday or legal holiday.

9. *Billing and Payment:* The period of time elapsing between monthly readings shall constitute the monthly billing period. On or about the tenth (10th) day following meter readings for water service, the Utility shall render a bill to the Commissioner or his representative. Payment of said bill shall be made on or before the tenth (10th) day following the date of rendition, unless said date falls on Sunday or a legal holiday in which case payment may be made on the next business day following the Sunday or legal holiday.

10. *Penalty for Non-Payment:* When any bill is not paid within thirty (30) days after the ten (10) days following the date of rendition, it shall be considered in default. The Utility shall not suspend service to the Development because of non-payment of any monthly bill. The Utility shall have the right to cancel this contract if two successive monthly bills remain unpaid for a period of thirty (30) days after the tenth (10th) day following the date of rendition. Such cancellation shall become effective only after fifteen (15) days' written notice to the Commissioner.

11. *Point of Delivery:* The point of delivery of water hereunder shall be at the outgoing side of the metering equipment of the Government located on or near the Development site at an appropriate location, more specifically defined as follows:

A single service through a six (6) inch meter located at ..... (To be completed by Utility)

12. *Accuracy of Meters:* The meters used in determining the amount of water supplied hereunder shall, by comparison with accurate standards, be tested and calibrated by the Utility at intervals of not to exceed twelve

(12) months. If any meter shall be found inaccurate or incorrect, it shall be restored to an accurate condition or a new meter shall be substituted by the Utility. The Commissioner or his representative shall have the right to request that a special meter test be made at any time. If any test made at the request of the Commissioner or his representative discloses that the meter tested is registering correctly, or within two per cent (2%) of normal, the Government shall bear the expense of such test. The expense of all other tests shall be borne by the Utility. The representative of the Commissioner shall have the right to be present at all meter tests and calibrations. The results of all such tests and calibrations shall be open to examination by such representative, and a report of every test shall be furnished immediately to him.

If the meter is tested and found to be not more than two per cent (2%) above or below normal, it shall be considered to be correct and accurate, insofar as correction of billing is concerned. If, as a result of any such test, said meter is found to register a variation in excess of two per cent (2%) from normal, correction shall be made in the billing, but no such correction shall extend beyond ninety (90) days previous to the day on which inaccuracy is discovered by test. The correction shall be based on the assumption that the consumption was the same as for the most nearly comparable periods of like operation (to be agreed upon by the parties hereto) during which service was correctly metered.

13. *Standard of Service:* The water to be furnished under the terms of this contract shall be of good, clear and wholesome quality and approved by the regulatory public health authorities. It shall be supplied in quantities sufficient for all the purposes and needs of the Development and the tenants thereof. The Utility will maintain sufficient resi-

dual pressure at the discharge side of the meters of the Government on the Development in order to assure adequate fire protection and other necessary service.

14. *Distribution System:* The Government shall furnish, construct, own and operate the complete and entire secondary water distribution system of the Development from the point of delivery.

15. *Resale:* No portion of the water supplied hereunder shall be resold, expect that the Government may sell or otherwise distribute water to the tenants of the Development as an incident of tenancy.

16. *Rights of Utility:*

(a) The Government hereby grants to the Utility at all reasonable hours by its duly authorized agents and employees the free right of ingress to and egress from the premises of the Development for the purpose of inspecting, repairing, replacing or removing the property of the Utility, of reading meters, or of performing any work incidental to the supplying of all service hereby contracted for.

(b) The Utility shall have the right to shut off the supply of water to the Development, without notice, only in cases of emergency. If the Utility shall find it necessary to shut off the supply of water to the Development to make replacements or repairs, or for other reason, and no emergency exists, the Utility shall give the Commissioner or his representative reasonable notice of its intention, including the approximate time and duration of such interruption of service.

17. *Annexation of Property of Utility:* Any and all equipment, apparatus and devices necessary to fulfill the Utility's obligation hereunder placed or erected by the Utility on or in property of the Development shall be and remain the property of the Utility regardless of the mode or

manner of its annexation or attachment to real property of the Development.

18. *Liability:* The water supplied under this contract is supplied upon the express condition that after it passes the meter equipment of the Government, it becomes the property of the Government. The Utility shall not be liable for loss or damage to any person or property whatsoever resulting directly or indirectly from the use or misuse or presence of water on the Development premises after it passes said meter equipment, except where such loss or damage shall be shown to have been occasioned by negligence of the Utility, its agents, servants or employees.

19. *Impossibility of Performance:* The Utility shall use all reasonable diligence in providing a constant and uninterrupted supply of water, but the Utility shall not be liable to the Government hereunder, nor shall the Government be liable to the Utility hereunder by reason of failure of the Utility to deliver or the Development to receive water as the result of fire, strike, riot, explosion, flood, accident, breakdown, acts of God or the public enemy, or other acts beyond the control of the party affected; it being the intention of each party to relieve the other of the obligation to supply water or to receive and pay for water when as a result of any of the above-mentioned causes, either party may be unable to deliver or use, in whole or in part, the water herein contracted to be delivered and received. Both parties shall be prompt and diligent in removing and overcoming the cause or causes of said interruption, but nothing herein contained shall be construed as permitting the Utility to refuse to deliver and the Government to refuse to receive water after the cause of interruption has been removed. In case of impaired or defective service, the Commissioner or his representative shall immediately give

notice to the nearest office of the Utility by telephone or otherwise, confirming such notice in writing as soon thereafter as practicable.

20. *Special Provisions*

21. *Previous Contracts Superseded:* This contract supersedes all previous contracts or representations, either written or oral, heretofore in effect by the Utility and the Government with respect to matters herein contained, and constitutes the sole contract by the parties hereto concerning these matters.

22. *Notices:* All notices which, under the terms of this contract, may be given by or issued to a representative of the Commissioner may be given by or issued to Executive Director, Housing Authority of Mohave County, whose address is Kingman, Arizona.

All notices which, under the terms of this contract, are to be given by or issued to the Utility may be given by or issued to ..... whose address is .....
.....

Either party shall promptly notify the other in writing whenever there is a change in the person who is to give or receive notices on its behalf.

All notices required or authorized to be given under this contract, except the notice set out in Section 19, shall be given in writing and mailed in the ordinary course of business to the last-known address of the appropriate person specified in this contract.

23. *Interest of Member of Congress:* No Member of or Delegate to the Congress of the United States of America or Resident Commissioner shall participate in the funds made available under this contract. Nothing, however, herein contained shall be construed to extend to any incorporated

company, if the agreement be for the general benefit of such corporation or company.

24. *Succession or Assignment:* This contract shall be binding upon the successors or legal assigns of the Utility.

25. *Non-discrimination in Employment:* There shall be no discrimination by reason of race, creed, color, national origin or political affiliations, against any employee or applicant for employment, qualified by training and experience, for work in connection with this contract. The Utility shall include the foregoing provision in all subcontracts for any part of the work of this Contract.

In Witness Whereof, the parties hereto have caused this agreement to be duly signed and executed in quadruplicate as of the day and year first above written.

United States of America

By .....
For the Federal Public Housing Commissioner

..... (Utility)

By .....
(Title)

Seal

Attest:

.....
(Secretary)